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IN THE

Supreme Court of the United States

October Term, 1955

No. 538

GLENN L. MARTIN COMPANY,

Petitioner,

vs.

NORTHWEST AIRLINES, INC.,
THE BRITISH AVIATION INSURANCE COMPANY, LTD.,
THE INSTITUTE OF LONDON UNDERWRITERS,
R. WALKER ROYLANCE and A. J. WHITTALL
(For the Subscribing Underwriting
Members of Lloyd's, London)
FIDELITY & CASUALTY COMPANY OF NEW YORK,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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NO GROUNDS FOR CERTIORARI EXHIBITED

This is a tort case under Wisconsin and Ohio law. The petition presents no grounds recognized by this Court as recommending review by certiorari. There is no Federal question. No claim is made that the decision sought to be reviewed is in conflict with the decision of another Court of Appeals on the same or similar matter, or that the Court of Appeals decided a state or territorial question in conflict with applicable state or territorial law; nor is any claim made that the Court of Appeals so far departed from accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

THE PETITION IS NOT TIMELY

The judgment of the Court of Appeals was entered May 31, 1955. Timely application for rehearing was made and was denied August 29, 1955. That petition sought (1) rehearing by the Court en banc, or (2) in the alternative, rehearing by the regular Court that heard the appeal. Thereafter a motion was made to vacate the whole order denying rehearing and to reinstate that portion of the motion that requested a hearing en banc. This motion to vacate the order dated August 29, 1955 was denied October 3, 1955, leaving in effect the order denying rehearing dated August 29, 1955. (All of these orders are in the appendix to the petition.) The petition for certiorari is dated November 23, 1955, and was filed November 25, 1955, both of which dates are more than the ninety days after August 29, 1955 allowed by 28 U.S.C.A., Sec. 2101(c).

The first timely petition for rehearing extended the period to apply for a writ of certiorari. The motion to vacate the order denying that petition did not extend that period since such motion was denied. The matter was not heard again on the merits. *Gypsy Oil Co. v. Bennett* (1927), 275 U. S. 498.

QUESTIONS PRESENTED

The issues are principally detailed fact issues plus construction of a particular contract.

For convenience we include all respondents in the term "respondent" or "Northwest", and sometimes refer to petitioner as "Martin".

Petitioner states as "Questions Presented" matters that, on the facts, are not presented. It does this by characterizing a defect which its 500 design engineers did not find as "open and obvious" to the airline which purchased its airplane. It likewise characterizes airborne radar as a "Known Aid to Safety" when its own witness testified that "There were no satisfactory radars available for commercial use" in 1948, and indeed that no airline in the world was using it five years later when the witness was testifying. (771a, 773a, 108a)

We suggest that the detailed discussion of the items should be examined and not the declamatory rhetoric.

The opinion below (Appendix to Petition, p. 24) is an admirable simplification of the mass of complicated facts which make up this lawsuit.

The questions presented fairly stated are:

1(a). Whether the purchaser of a machine who examines it to some extent for his own protection and finds nothing wrong has assumed the risk of a defect that actually was there and was identified by an expert after failure but which was not in fact discovered by the purchaser.

Whether such a purchaser, who is under no duty to examine, is guilty of contributory negligence in not finding the defect which the manufacturer, charged with that duty, did not find and where the manufacturer in no way relied upon the purchaser for assistance.

CONTRIBUTORY NEGLIGENCE

On contributory negligence there was sufficient evidence to submit to the jury the issue of whether Northwest was negligent in operating the Winona airplane.

However, as to the other four airplanes Martin conceded that there was no negligence of Northwest in the maintenance or handling of the airplanes after delivery. (760a) Therefore, any contributory negligence must have been before delivery.

In its charge the trial court said:

> "With respect to all the planes in question, the defendant charges that the plaintiff Northwest was itself negligent during the period of design, manufacture, sale and delivery of these airplanes, *and that this negligence by Northwest directly caused or contributed to cause physical damage to the five airplanes.* (864a)
>
> * * * * *
>
> "It claims further that if there were, in fact, any defects in respect to the design or material or workmanship or testing procedures, which it denies, then and in such event the plaintiff Northwest had actual knowledge of them or ought, in the exercise of ordinary care, to have known of them, and that in failing to make any complaint or objection at any time, and in accepting delivery of the airplanes without any complaint or objection it was negligent; *and it claims also that such negligence of Northwest was a directly contributing cause to the physical damage to the planes.*" (Italics supplied.)

It is submitted that:

(a) Northwest owed no duty to check Martin's work, whether in design, selection of material, workmanship, inspection or tests or any other manufacturing operation.

(b) The fact that it sent inspectors to the Martin plant did not create any such duty.

(c) The fact that it sent inspectors to Martin's plant in no way contributed to the accident.

The charge was wrong as a statement of law. No duty existed and there was no possible evidence upon which the jury could find that Northwest failed in a duty it did not owe.

Northwest Airlines believed Martin to be a reputable and competent designer and manufacturer of airplanes. This is conceded and affirmatively alleged in the Answer. (10a) It had no duty to do more. This is so obvious that Petitioner agreed at page 171 of its brief below:

> "*If* Northwest had simply relied on Martin to produce a safe and sound airplane and had taken no further interest in the matter, there would be no issue here of contributory negligence."

That means ordinary care would have been used if Northwest sent no engineers to the Martin plant. Therefore, it did not fail in ordinary care if it sent one engineer, or if it sent ten engineers, with instructions that they should, in addition to their principal duties, report upon any elements in the airplane that appeared to them dangerous.

If the engineer so sent to Martin was not qualified and if there were hazards that a qualified aircraft design engineer would have found, it still is not lack of ordinary care, because it is conceded that Northwest was not required to send any engineer. An unqualified engineer cannot be worse than none *unless Martin relied upon such engineer and thus reduced its own forces or its own care. There is no claim of any such reliance.* Instead, Martin's answers to interrogatories denied any reliance. (563b-564b)

1(b). Whether a court may submit to the jury the question of whether it is negligent for an airline not to use airborne radar where the only three witnesses on the subject testified that no suitable radar was available.

2. Whether the Court of Appeals in reversing the District Judge for charging on contributory negligence and assumption of risk was in error on the facts.

3. Whether the trial court and the Court of Appeals both construed a contract erroneously.

4. Whether respondent properly objected to the charge of the trial court under Rule 51 of the Federal Rules of Civil Procedure.

We now turn to each item.

ASSUMPTION OF RISK

It is undisputed that under Ohio and Wisconsin law a person assumes the risk of a hazard only if he actually appreciates it or the danger is so obvious that he must be taken to have done so. *Morris v. Hockey Club,* 157 O. S. 225, 105 N. E. 2d 419 (1952); *Masters v. N. Y. Central Rd. Co.,* 147 O. S. 293, 70 N. E. 2d 898 (1947); *Knipfer v. Shaw,* 210 Wis. 617, 246 N. W. 328 (1933). The latter clause is simply a way of saying that a denial of knowledge that is necessarily a sham under the circumstances will be disregarded. The heart of the doctrine is actual knowledge of the risk. One does not assume a risk he does not know exists.

Here Petitioner's 500 design engineers working on this airplane did not perceive the defect. The Court of Appeals examined the huge record closely and decided there was no evidence that the one young airline engineer stationed at the Martin plant or the occasional airline visitors did perceive it.

Petitioner carries water on both shoulders and says that

while its 500 engineers did not perceive the defect, Northwest Airlines' personnel must be presumed to have perceived it because Dr. Tuckerman, the fatigue expert of the Bureau of Standards, who examined the broken part for the Civil Aeronautics Administration after the accident, held that specific part in his hand, knowing its history, and said it didn't take him five minutes to know it was not right. He further said that to a competent engineer (a design engineer, we presume) who knew the loads and other factors, the defects would be obvious. (239a-240a; Petition, p. 11)

That is a far cry from saying that Northwest's one young airline engineer or its occasional visitors actually did perceive the defect in this one of 75,000 parts during manufacture which Martin's 500 aircraft design engineers completely missed. There is no testimony that they ever looked at the spar cap splice that failed.

We make no claim that Martin's engineers actually knew the part was defective. That would be as incredible as that Northwest's men knew the defect and still bought the airplane. We definitely claim that Martin's men should have known it.

The trial court also submitted to the jury the three issues that Northwest also assumed the risk of inadequate workmanship, inspection and testing. Martin denies they existed and introduced evidence that Northwest heartily approved the testing and now says the inadequacies were so obvious that Northwest must have actually known them. There is no evidence of any kind to this effect. The Court of Appeals properly reversed.

It is well settled that if one who owes no duty undertakes to act this does not create any duty unless the other party relies thereon, or the act itself creates a hazard.

Thus, where a landlord who has no duty to repair does in fact repair a stair rail ineffectively, he is not liable for its failure, because the tenant did not rely on him and his efforts did not cause the accident. *Kuchynski v. Ukryn* (1938), 89 N. H. 400, 200 A. 416.

To the same effect is *Restatement of the Law on Torts*, Sec. 325; *Therrien v. First National Stores* (1939), 63 R. I. 44, 6 A. 2d 731; *Kirshenbaum v. General Outdoor Advertising Co.* (1932), 258 N. Y. 489, 180 N. E. 245, 84 A. L. R. 645.

Moreover, there is no causation here. None was pleaded (15a); none was proved.

The petition has a quotation on page 13 from *Marks v. Nambil Realty Co., Inc.* (1927), 245 N. Y. 256, 157 N. E. 129, that apparently holds that contributory negligence need not contribute, but the whole of that case is to the contrary.

The charge of the trial court here required the alleged contributory negligence to have causative effect. (See italics supra, p. 6) It is too late for Petitioner to claim that the charge was legally erroneous.

In *Marks v. Nambil Realty Co.*, supra, a landlord gratuitously promised to repair a stair rail and made a bungling job. Plaintiff expressed misgiving, but was assured it would "last forever". The event belied the prophecy. The opinion concludes:

> "The plaintiff came down the stairs, his arms hampered by a burden. The inference is permissible that the presence of the prop cloaked the defect, dulled the call to vigilance and so aggravated the danger."

Although it is plain and conceded that Northwest was under no duty to check the design of the splice, it might be argued that if in fact Northwest did check, and *actually* did find and appreciate the risks in the splice but nevertheless put the airplanes in service, it should not recover. This is assumption of risk which would prevent recovery, and not contributory negligence. But the trial court charged on both. That is error.

THE ERRORS WERE PREJUDICIAL

The radar issue was applicable to the airplane that crashed in turbulent weather in Wisconsin. The comparative negligence law in effect there provides that if plaintiff is guilty of more than 50 per cent of the total negligence, there can be no recovery. The jury might well have concluded that Martin was negligent but that Northwest was also negligent to some degree in dispatching the plane *and* in not having radar, thus adding both up to 50 per cent of the total negligence, or that the radar issue alone was 50 per cent. Thus the charge on contributory negligence was prejudicial on that plane.

As to the other planes, they were governed by Ohio law which makes any contributory negligence fatal to recovery. Obviously the charge on contributory negligence was prejudicial.

As to all planes, they were governed by the rule in both Wisconsin and Ohio that assumption of risk bars recovery, so that erroneous charge was prejudicial.

STANDARD OF CARE

Petitioner then argues that all that was necessary for it to do under the contract was to comply with Civil Air Regulations to be relieved of liability, no matter how negligent otherwise, *and that there was no evidence of its departure from CAA regulations.* It thus argues that "as a matter of law" Martin could not be held negligent and therefore all errors were harmless.

As to the first we quote the trial court:

> "The Court: Do you seriously contend, Mr. Crocker, that that contract limits Martin's liability to compliance with the Regulations? Doesn't it simply say that they will comply with the Regulations? Does it in any form or in any respect say that compliance with the Regulations relieves them of liability? I think I have read this contract carefully, I have read the contract many times—I must have read it fifty times, if I read it once, and I read it and reread it—but all I can remember in there is the agreement that they will comply with the Civil Air Regulations. It doesn't say that compliance with those Regulations relieves them of any liability."

The second point, the claim that there was no evidence that petitioner violated the Civil Air Regulations, is wholly inconsistent with petitioner's claim that the evidence showed the defect in the airplane was so obvious that the purchaser must have actually known of the defect.

The Civil Air Regulations (1201a) provide, among other things, that fittings such as the one that failed, should have a safety factor of plus 15 per cent. They also provide that such fittings shall be designed to minimize fatigue. (1201a) Martin's witnesses and answers to interrogatories admitted that the secondary stresses, including those from eccen-

tricities, had never been calculated before the accident, although Glenn L. Martin himself testified they should have been. (281a, 282a, 285a) Such calculations involve some elements of judgment (R. 602a) and take about eight hours (R. 584a) which may explain this carelessness.

After the accident, Martin did calculate all the stresses and submitted the results to the Civil Aeronautics Administration as part of the "phase 3 fix" which was the process of getting the planes re-licensed to fly. That calculation (Plaintiff's Exhibit 70; 1073a), the first and only complete analysis made by Martin on the fatal splice, showed the fitting had a minus 6 per cent margin of safety instead of the plus 15 per cent margin required by the Civil Air Regulations. (605a)

In another stress analysis Martin, as part of the original licensing procedure, advised the CAA that the loads on the rear spar were greater than on the front spar at the point that failed, and therefore figures on the rear spar only were submitted. (577a) Actually, as Martin's chief stress analyst testified, the stresses on the front spar, where it failed, were far higher than on the rear spar. (584a)

Martin even stated to the CAA that the cross-sectional area of the part that failed was thicker than it actually was. (574a, 577a)

ASSERTED LACK OF OBJECTION REQUIRED BY FEDERAL RULE 51

It is urged that respondent did not sufficiently object to the charge on assumption of risk, contributory negligence in not finding the defects and contributory negligence in not using radar.

This issue was not raised in the Court of Appeals and is without merit.

The purpose of Rule 51 is that the trial court should be fully informed of the position of the parties while he may yet correct errors.

In this case a day was set aside to consider requests to charge. (809a) Respondent by request No. 10 asked for a specific charge that there was no issue of contributory negligence except as to the one plane that crashed in the storm. (815a) As shown below, respondent also objected to requests by petitioner for charges on assumption of risk and on radar.

The court denied respondent's request No. 10 and requested respondent to draw a charge on contributory negligence in a form respondent thought proper if that issue was to be charged. Respondent did so as No. 14 saving its objection. (577b)

After the charge, as shown on page 20 of the petition (878a), respondent said it had no objections "except with reference to those matters which we have already presented to the Court and on which you have already made and announced your rulings". The Court stated, "* * * The record will show, gentlemen, whatever objections or exceptions you have noted to the Court's refusal to charge as you have requested will be regarded as having been made at this time."

Petitioner construes this to cover only refusal to grant affirmative requests, and not including requests not to charge on specific items. This is unreal and picayune.

The Court was fully advised of the objections to charging on the three items the Court of Appeals found erroneous. The record shows the following:

As to contributory negligence.

Plaintiff's request No. 10 was for a charge that there was no contributory negligence in the case except as to this one plane lost in the storm. (815a) The request was denied.

The record then shows:

> "Request No. 14 was not one of the instructions requested by plaintiffs. The Court requested the plaintiffs to prepare a statement of the law relating to the problem of contributory negligence which, in their opinion, would be proper and appropriate if, contrary to their contention, it was proper to charge upon that subject. In response to this request the plaintiffs prepared No. 14, as set forth below, but with the specific proviso and understanding that they did not desire that it be given but, on the contrary, specifically requested and continued to stand on the request that their request No. 10 should be given * * *." (577b)

The record also shows the following:

> "The Court: It is your contention then that you should not be charged with the contributory negligence if your men saw what was happening there and said nothing about it?
>
> Mr. Harrison: That's right, Your Honor, that doesn't put it quite right. We stand on the record. We don't believe there is any evidence that our men saw anything or had any reason to see anything, and that the things which were there were not within their field or scope. (826a)
>
> * * * * *
>
> The Court: Well, that, of course, is your view that there is no evidence at all on the proposition.
>
> Mr. Harrison: That's right.
>
> The Court: But that, I think, is a question for the jury to determine." (827a)

This is precisely the issue on contributory negligence decided by the Court of Appeals.

As to assumption of risk, there was long discussion (827a, 828a, 829a, 830a, 831a) on petitioner's request No. 4 on that issue ending as follows:

> "Mr. Harrison: That's right. The Ohio cases are very precise that assumption of risk does not apply, as the Court has said, unless there is actual knowledge. That's the distinction between actual knowledge and 'ought to have' knowledge. In the latter instance it is only contributory negligence. Our position here is, Your Honor, that there isn't one word of evidence upon which the jury could find that, and if we are wrong about it then we are wrong about major premise, but we have considered it very carefully. I don't believe Mr. Crocker or Mr. Horn or Mr. DeMarco can point out any evidence indicating that there is any such evidence. Every witness has either been silent or has expressly disclaimed it, and I don't believe jurors can merely speculate in the absence of evidence. I don't think there is any evidence which would warrant the submission of that issue." (831a)

This is precisely the holding of the Court of Appeals on assumption of risk.

As to radar, the record shows:

> "Mr. Harrison: (reading petitioner's request No. 5) * * * We don't object so far but then I go on: * * * 'in failing to install in the plane equipment which would have enabled the pilot to have avoided the storm referred to.' Their own witness expressly stated in his testimony that there was no such radar equipment available, that it isn't being used. If that is correct—that is, used in commercial airlines—if that is correct. I don't believe it

> is proper to submit this request to the jury, that we should have had radar in the airplane when their own witness expressly said there isn't any radar that is available. That's our point on that. It seems to me you can't possibly submit that issue to the jury on the basis of their own testimony." (831a, 832a)

Again, later:

> "Mr. Harrison: Of course, we renew our objection in the third paragraph to the inclusion as a ground of negligence the failure to install radar. * * * There is no evidence." (833a)

This is precisely what the Court of Appeals found.

EN BANC PROCEDURE

The Court of Appeals for the Sixth Circuit has the uniform procedure that when the judgment complained of was decided by a regular Court consisting of three judges only, a petition to rehear will not be considered by the Court en banc. This procedure was made public August 12, 1955, in *National Labor Relations Board v. Cambria Clay Products Company*, No. 12072. This is in accord with *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.* (1953), 345 U. S. 247, which held that the Court in each circuit may prescribe its own procedure relative to en banc hearings, including the procedure that the three-judge court which heard the matter could pass upon the petition for a hearing en banc.

Petitioner complains, however, that there was no publication of this procedure by rule or published decision prior to August 12, 1955, which was after petitioner had filed its petition for rehearing.

The petition dated June 12, 1955 was addressed to the Court and prayed for:

1. Rehearing by the Court en banc conformably to the rule of *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, or, if the Court shall determine against rehearing en banc, then
2. By the Court pursuant to its Rule 28 (which provides for ordinary rehearing).

The regular three-judge Court which had heard the original argument considered this petition which was both for rehearing en banc and by the regular Court, and on August 29, 1955 denied any rehearing. (Appendix to Petition, p. 46)

If, in fact, petitioner was unaware of the uniform procedure to refer such petitions to the regular three-judge Court, we cannot see how petitioner was prejudiced. The petition, with its alternative, was clearly addressed for the consideration of the regular three-judge Court which in fact passed upon it. The opportunity to point out reasons for rehearing en banc was not only present but was fully utilized.

Should the petition for certiorari be granted to review this point, and *arguendo,* should this Court determine that there should have been an earlier or broader publication of this uniform procedure by the Court of Appeals for the Sixth Circuit, we cannot see what order other than affirmance could ensue.

The matter could not be remanded with directions that the Court of Appeals en banc hear the petition because that would be contrary to its proper uniform procedure.

It could not be remanded with directions that the regular three-judge Court that heard the original argument should consider the petition because it already has considered it, including the argument for rehearing en banc.

The plain fact of the matter is that petitioner has had his full day in the Court of Appeals. To date, petitioner has filed four briefs (including two petitions for rehearing) in that court aggregating 310 printed pages. The case was argued and submitted over a year ago. It is now time for this case to be remanded from the Court of Appeals to the District Court without further delay.

Respectfully submitted,

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